



seeking to set aside a deed to him from Robert<sup>1</sup> on the ground that the conveyance was fraudulent.

On September 13, 1993, each Defendant filed a pro se answer. Only Mrs. McGaha demanded a jury. Later, on February 2, 1995, each Defendant moved to be allowed to file a counter-claim in which a jury was demanded. Although there is no order granting the motion, it appears from the remainder of the record that it was granted and we accordingly will treat this as true.

When the case was called to trial on the non-jury docket, the Defendants moved that the case be continued to a jury docket. Whereupon, Mr Sanders took a voluntary non-suit as to Mrs. McGaha. The case then proceeded to trial as to the two Ramseys, resulting in the following judgments: (1) compensatory damages against Robert in the amount of \$10,000 and punitive damages in the amount of \$5000; (2) judgment setting aside the deed from Robert to Dennis as fraudulent.

It is true that T.C.A. 21-1-103<sup>2</sup> grants as a matter of right a jury trial in chancery cases in most instances. However, the jury demand must be timely made. In the case at bar it is clear that such was not the case insofar as the Ramseys were concerned.

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<sup>1</sup> Our use of the first names of the parties should not be construed as any disrespect, but rather is for ease of reference.

<sup>2</sup> **21-1-103. Right to trial by jury.**--Either party to a suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, save in cases involving complicated accounting, as to such accounting, and those elsewhere excepted by law or by provisions of this Code, and all the issues of fact in any proper cases shall be submitted to one (1) jury.

They insist, however, that by virtue of Rule 38.05 of the Tennessee Rules of Civil Procedure, hereinafter set out, the Court was in error in overruling their insistence upon a jury trial:

**38.05. Waiver.**--The failure of a party to make demand as required by this rule constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of all parties as to whom issues have been joined.

In the first place, we note that the Rule speaks to withdrawal of a jury demand, which was not the case here, as Mrs. McGaha never withdrew her demand, but rather her demand was eliminated upon a non-suit being taken as to her. Moreover, even if she had withdrawn her request for a jury trial the Ramseys would not be entitled to take advantage of Rule 38.05 because no issues were pending between the Ramseys and her. The only issues joined were between the Defendants and Mr. Sanders.

Given the fact that the Ramseys could have insured a jury trial for themselves by the simple expediency of demanding one in their answer, we are disinclined to make the tortured interpretation of the Rule they espouse.

One last matter needs to be addressed: Were the Ramseys entitled to a jury trial as to their counter-complaint because a timely demand was made? Assuming for the purpose of this opinion the answer is "yes," we nevertheless must consider the following findings of the Trial Court relative to the counter-claims:

The Court further finds that the Counterclaims that have been filed have not been pursued; that no evidence has been offered to sustain them; and that the same have not been sustained, and are THEREFORE, DISMISSED with the cost applicable to same being assessed to the counter-complainants for which execution may issue.

It necessarily follows that had a jury been empaneled Mr. Sanders would have been entitled to a directed verdict, thus rendering the failure to empanel a jury harmless error. Finally as to this point, we note there was little appellate advocacy by the Ramseys in support of their right to a jury trial as to the counter-complaints.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of the judgment and costs below and such further proceedings, if any, as may be necessary. Costs of appeal are adjudged against the Ramseys and their surety.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Sr.J.